

1 present, if the regulatory control were present, if the
2 power to require were present, then the approval would be
3 granted. And the only way that approval -- the only way
4 that power could not be present -- or could be present is
5 by a waiver by the Tribe.

6 Now, the --

7 THE COURT: How do you deal though with the fact of
8 the matter that we all -- whether we're individuals or
9 businesses or whatever, we all come to the table of life
10 with certain characteristics. And granted, the Tribe has
11 some very unique characteristics that are rightfully
12 protected by federal law, but nevertheless, what's
13 involved here is someone is asking to purchase a
14 commercial enterprise that really -- well, they exist all
15 throughout the State of South Dakota. And the fact that
16 the Tribe comes to the table with some different
17 characteristics that may make it more difficult for them,
18 how does that -- how does that square with the federal
19 Indian law that's involved here?

20 It seems to me that that's just a fact of life that
21 the Tribe has got to deal with. If they have some
22 conditions or situations that place them in a disadvantage
23 compared to other persons, in this case, the City of
24 Alcester and Beresford had some -- had some negative
25 characteristics because of their unique status as

1 municipalities and the laws that govern municipalities.
2 Now, you know, is it -- it seems to me that you come to
3 the table with what you've got and when you're trying to
4 buy something, rather than the State reaching out and
5 affirmatively trying to regulate something on the
6 reservation, we're talking about a totally different
7 situation here.

8 MR. MAXFIELD: Fair enough, your Honor, in the sense
9 that the Tribe indeed does come to the table with some
10 unique characteristics that are unlike those of any other
11 entity that maybe we know in this country of ours. But
12 the fact is they do have those and Wold Engineering very
13 clearly indicates that those characteristics are federally
14 protected --

15 THE COURT: Let me interrupt because --

16 MR. MAXFIELD: -- and -- oh, I'm sorry.

17 THE COURT: No, don't be sorry. I interrupted you.
18 What it really comes down to, I think, is whether I was
19 right in my footnote of saying that they can consider the
20 effects, but may not -- but may not express -- expressly
21 is not the word either. Expressly or impliedly condition
22 access or condition approval upon a waiver.

23 MR. MAXFIELD: Yes, sir.

24 THE COURT: Now, it seems to me that's what we're
25 really beating around the bush here on because if I'm

1 incorrect in that regard that they can't consider the
2 effects of sovereign immunity, then I think you're right.
3 So why don't we get to that because isn't that really what
4 this is about, what this argument is about. It's a matter
5 of semantics and we're kind of walking around the outside
6 of it, but either they can consider the effects of the
7 unique status the Tribe is in or they can't.

8 MR. MAXFIELD: Well, we know, your Honor, that they
9 may not condition approval --

10 THE COURT: We know that.

11 MR. MAXFIELD: -- implicitly based on Wold
12 Engineering. We know that this Court very possibly is
13 correct that they can consider the effects. And
14 personally, it seems to me that that is not conditioning,
15 considering the effects. It's one of some other factors.

16 The question here the Commission has said in its
17 brief is that it is just treating immunity as one factor
18 of however many it doesn't say. But there's a difference
19 between the two. What is it? Which category does this
20 Commission's orders fall into? I think the only way a
21 person can tell that, your Honor, is by looking at the
22 considerations that the Commission took into account.

23 What considerations did it take into account? Well,
24 it had from its point of view, your Honor, the negative
25 ones of all of these characteristics of tribal sovereignty

1 and self-government that render it inaccessible to the
2 State Commission. There weren't any other -- I didn't see
3 mention of any other negative characteristics at all. And
4 maybe I missed them. I do from time to time.

5 But I recall in there as well, mention even by the
6 Commission, positive characteristics. Namely, an
7 excellent track record of provision of service, the
8 ability to provide state-of-the-art communications, the --
9 and in fact a history of providing state-of-the-art
10 communications, a commitment to working out a memorandum
11 of understanding with the Commission regarding an
12 enforcement mechanism. A -- you and Mr. McElroy have
13 talked about the proposed tax agreement, but there aren't
14 any other negatives. It just seems to me, your Honor,
15 that if the Commission was in substance saying because it
16 had no ability to require, it had no ability to enforce,
17 it had no ability to control, it was refusing to approve,
18 that that in effect is just what it did in the first
19 hearing and in effect, it's what the State of North Dakota
20 was doing in the Wold Engineering case, and that is
21 illegal.

22 THE COURT: Well, in your view, is -- is the denial
23 by a state regulatory body of permission to purchase a
24 highly regulated commercial enterprise tantamount to
25 denying access to courts like was present in Wold.

1 MR. MAXFIELD: Very definitely, your Honor.

2 THE COURT: How so?

3 MR. MAXFIELD: The Congress has indicated in a number
4 of separate acts -- we've cited several in our opening
5 brief -- the not only the importance of, but its desire to
6 help encourage economic development on Indian
7 reservations. President Nixon in that announcement that I
8 think is quoted in our opening brief indicates the
9 importance of economic development. And if we're to say
10 well, we carve out a certain area of this spectrum of
11 economic activity that we can engage in this country as
12 free groups and free people, certain activity that isn't
13 appropriate for some, that is -- it seems contrary to what
14 Congress is mandating.

15 And I mean, the Congress itself has indicated in the
16 '96 Telecom Act that eventually, everyone is going to
17 enjoy or suffer with a totally different form of
18 regulation, a form of regulation that will be -- will be,
19 in their view, more effective than the traditional state
20 rate regulation, than even the self-regulation that
21 follows from an individual's ability to vote in the tribal
22 election as mentioned. We're going to have a regulation
23 that results from competition, people regulating with
24 their feet in effect and choosing providers based on price
25 and service and so on. And all of this that is heavily

1 regulated is going to be history, your Honor.

2 So I'm saying that the importance of regulation in
3 this context is future importance is dim and right now,
4 the Cheyenne River Sioux Tribe has the door closed to it
5 in terms of engaging in these activities.

6 THE COURT: Well, I talked about that in my prior
7 decision and unfortunately, we didn't have a chance to
8 brief or argue that because the Act was just passed, but
9 you know, I've been involved, as Mr. Welk knows, in a
10 couple of these cases and I'm slowly -- very slowly,
11 trying to learn this telecommunications law.

12 Why -- let me start over.

13 It seems to me that your Wold argument is severely
14 compromised by this Act because the Authority is going to
15 have access, whether through reselling or as you've
16 indicated in your brief, setting up a redundant system.
17 One way or the other, if they want to do business, this
18 new laws gives them the ability to do business up there
19 whether the State PUC wants them to or not. That's a lot
20 different situation than having access to courts to
21 litigate disputes. It seems to me that's a lot different
22 than Wold, isn't it?

23 MR. MAXFIELD: Fair question, your Honor. And the --
24 I mean, under the Act in the future, there really are at
25 least two possibilities for the Tribe -- possibilities now

1 for the Tribe if it wishes to engage in the business other
2 than by acquisition of an infrastructure from another
3 provider, US West. One is to develop the redundant
4 system. And I don't have the evidence to demonstrate to
5 you that that is economically foolhardy, but I mean, I
6 can't imagine that it wouldn't be economically foolhardy.

7 THE COURT: Just from what I've picked up in the last
8 few PUC cases I've heard, it sounds to me like what the
9 Federal Act is contemplating is that these competitors are
10 to get their foot in the door by reselling and eventually
11 by setting up their own -- their own infrastructure. I
12 don't know if that's correct or not, but I've picked up
13 that flavor some place from the various cases I've heard.
14 Why wouldn't that work for the Tribe here?

15 MR. MAXFIELD: Your Honor, that is the other
16 alternative, just purchasing wholesale and reselling
17 retail and doing a better job than US West does of
18 providing the service wherever it wants to engage in
19 business. The difficulty there under the '96 Act is the
20 Congress says -- and I think it's actually in Section 253
21 of Title 47, is that the State Commission can involve --
22 until the Federal Communications Commission has elected to
23 come in and in effect preempt the State, that the State
24 can consider whether a new entrant will -- I forget the
25 precise words, but in effect, satisfy the public interest.

1 And what this -- what does public interest mean? Well, we
2 have an idea of the Commission's view of what the public
3 interest means in its interpretation of this case as in
4 its ruling.

5 THE COURT: But I see from your brief --

6 MR. MAXFIELD: I'm sorry.

7 THE COURT: I see from your brief you've already
8 petitioned the FCC to preempt this very statute.

9 MR. MAXFIELD: Well, we've petitioned it, but the --
10 there's a long road to go to accomplish that. But the
11 fact is in the Appellee's brief, the Commission's brief,
12 at page 21, I think, your Honor, the Commission says that
13 clearly public interest takes into account the ability to
14 regulate under the '96 Telecom Act, the Federal Act.

15 So what it seems to be saying there -- and I may be
16 misconstruing their brief, but what it seems to be saying
17 there is public interest in the Federal Act is the same as
18 state and public interest in the State Act bars the Tribe
19 from owning a -- buying a telephone exchange. So if it
20 can't get approval to buy, it's not going to get approval
21 to purchase at wholesale service and resell it retail.

22 So I mean, that's an open question unless you decide,
23 your Honor, that the public interest as we raise in our
24 issue number 1, that the public interest doesn't require
25 the full extent of control that the Commission is

1 insisting upon here.

2 THE COURT: Okay. Anything else?

3 MR. MAXFIELD: No, sir, that's it.

4 THE COURT: Okay. Mr. Welk.

5 MR. WELK: In light of the time that's expired, your
6 Honor, I will keep my remarks very brief.

7 As indicated in my opening remarks, what I wanted to
8 visit with the Court about is the relief in this case. It
9 is almost a year since your Memorandum Decision in this
10 case. You are well aware of your -- the options available
11 and judicial review of this record to affirm, modify,
12 reject or remand the Commission's second decision. You
13 can see that your last sentence in your opinion created a
14 great deal of controversy upon remand. I'm not -- I have
15 no divine characteristics. I don't know what was in your
16 mind.

17 THE COURT: Well, let me just make it easy. I
18 intended it to be a review on the record. That is what I
19 -- that was what my decision was meant to say. That's
20 what I thought I was saying in the decision.

21 MR. WELK: Well, if that was your decision, that's --
22 we accept that. Only you can tell us what your intent of
23 the decision was.

24 THE COURT: That was my intent. I'll just tell you
25 right now.

1 MR. WELK: Well, we moved to reopen a couple of
2 factors and I don't -- if it was your intent to
3 acknowledge the existence of the Telecom Act, but not
4 allow the Commission to consider it --

5 THE COURT: Well -- and when I read your brief --
6 first brief, I said right away, remand. That's not fair,
7 I remanded it on the record, now we've got this
8 Telecommunications Act Section 253(a). I was with you all
9 the way on remand until I got your reply brief and you
10 pointed out 253(b) or (c) or (d) -- I think it's (d) which
11 says that the FCC apparently -- it looks to me like the
12 FCC has exclusive jurisdiction to decide this preemption
13 issue.

14 So it doesn't look to me like it would do any good to
15 remand it to the Commission on the 253(a) issue because
16 you've already filed a petition with the FCC and it looks
17 to me like -- I didn't bring the book down with me, but it
18 looks to me like the language is pretty specific that the
19 FCC shall determine whether any state regulation or
20 statute or action of a Commission has violated 253(a). So
21 I don't know that it would do any good to send that back
22 to the PUC anyway, would it?

23 MR. WELK: I didn't ask you to do that. You didn't
24 let me finish.

25 THE COURT: But what I'm saying --

1 MR. WELK: I don't want a remand.

2 THE COURT: You don't?

3 MR. WELK: Absolutely not. Three years have passed
4 almost since the closing of this record. In June of '98
5 it will be three years. It is unfair to the people and to
6 the parties involved in this lawsuit to have a remand. In
7 light of the record and how much time has expired, the
8 money and the lives of the people at stake, I do not
9 believe that remand is appropriate. The issues that we
10 have raised, whether it's the Telecom Act or the effect of
11 the proffered dispute resolution procedure that was put in
12 the offer of proof, I believe you can look at. That's the
13 point that I was trying to say is we don't want a remand.
14 It's not fair to anybody in this proceeding to have that.

15 So that's really what I intended to say is we have
16 made the argument that was in error. I accept whatever
17 you say your intent is. We don't want it to go back.
18 It's time this case get decided and move on. These are
19 significant issues for all the parties involved. I
20 understand that. And they're complex issues involving
21 sovereignty of the people involved and it's time to make a
22 decision. And let's get on with it. Let's either affirm
23 it, let's modify it, but it's time to move this case off
24 the docket. And that's my only point.

25 THE COURT: Okay. Mr. Long or Mr. Hoseck.

1 MR. LONG: We're trying to sort that out.

2 MR. HOSECK: Thank you, your Honor.

3 Just briefly, I'm not going to reiterate anymore of
4 the brief that we filed than is necessary. I think that
5 we've done what the Court told us to do in this case and
6 that was to come back with some Findings of Fact on the
7 criteria that were set forth in the statute.

8 What standard is used, I know there's been some
9 philosophical arguments back and forth about that, but I
10 think that there is substantial evidence in the record to
11 sustain what the Commission decided in this particular
12 case. Bear in mind, your Honor, I think that there's one
13 point that has come out here and that perhaps needs some
14 clarification. And that is that the Commission has
15 regulatory authority over US West. And it's the
16 jurisdiction over the sale which is what the Commission
17 has exercised in this particular case. And it has looked
18 upon these various factors and denied the approval of the
19 sale.

20 This matter of failure to reopen the record I think
21 that has been dealt with succinctly here so I'm going to
22 move to the equal protection argument.

23 Irrespective of what standard is used, I think it
24 boils down to one thing, your Honor, and that is whether
25 or not in applying this standard, that the statute has --

1 or the standards that the statute has, whether or not
2 there is something that has gone wrong in the application
3 of that process to indicate that there has been a denial
4 of equal protection of law. And I think that the case
5 cited by the Appellants, the Plyler v. Doe case, has a
6 provision in it, a quote that says that the Constitution
7 does not require that things which are different in fact
8 or opinion be treated in law as though they are the same.
9 And I think that that case succinctly states what has
10 occurred here. And I think that the Commission looked at
11 that.

12 And in fact, the Commission did look at these factors
13 on remand in the record and said because of primarily
14 overwhelming public interest in these particular cases,
15 there should not be an approval of the sale. And I think
16 that's what it boils down to, plain and simple. There's
17 no invidious purpose here by the Commission or anything of
18 that nature. Thank you.

19 THE COURT: Mr. Long.

20 MR. LONG: Thank you, your Honor.

21 Let me try to respond to a couple of the statements
22 that Mr. McElroy made and Mr. Maxfield. The -- we -- I
23 read the Court's opinion to not conclude -- or at least to
24 leave open the question as to the extent of Commission
25 power and regulatory authority over the sale of these

1 three exchanges or Commission regulatory authority over
2 these three exchanges in the event that they were sold to
3 the Telephone Authority. I think that's an open question
4 and an interesting, though fuzzy question.

5 And -- but I think in determining or in viewing the
6 Commission's decision, I think that the basic question
7 that drove the Commission decision was the answer to the
8 question about what are the rights of the consumers in the
9 Morristown, McIntosh and Timber Lake exchanges today, what
10 are their safeguards and what will their safeguards be in
11 the event that this sale was approved and that they became
12 owned by Cheyenne River Sioux Tribe Telephone Authority.

13 And I think that their situation, as it currently
14 exists, is fairly clear and that is, that because US West
15 is a monopoly, the PUC exists to regulate such entities
16 and the PUC, pursuant to their regulations, does regulate
17 rates; they regulate quality of service; they regulate a
18 variety of things which US West does. If the sale was
19 approved and the consumers in Timber Lake and McIntosh and
20 Morristown exchanges were transferred to the Cheyenne
21 River Sioux Tribe Telephone Authority, the status of their
22 ability to look to the PUC for consumer protection is, at
23 best, an open question and --

24 THE COURT: Well, you know, what's to say they're not
25 going to get the same protection by the Tribal Authority?

1 I mean, whose to say that they're not going to exercise
2 the same level of supervision that the PUC would exercise?
3 Is there a -- I mean, somehow there certainly can't be a
4 presumption or isn't any record evidence of a presumption
5 that they're not going to exercise their power over
6 telecommunications in an inferior way to what's being done
7 today, is there? There's no record evidence I didn't see,
8 of that.

9 MR. LONG: I suspect there is no record evidence,
10 your Honor. There's probably no record evidence that US
11 West would not continue to abide by the same rates and
12 same high quality of service if they didn't have to go to
13 the PUC and ask for that, but the history of monopolies is
14 such that the PUC exists to regulate US West because
15 historically, entities like US West and the railroad and
16 the entities that I discussed in the brief, simply can't
17 help themselves. Eventually they take advantage of the
18 situation that exists that they are a monopoly which is
19 why regulation is necessary and why Public Utilities
20 Commissions exist to -- everywhere.

21 Now, there is certainly some suggestion that they can
22 not self-regulate as a municipal telephone authority would
23 or as a cooperative would because the Eighth Circuit Court
24 has recognized in the Cheyenne River Excise Tax case
25 that the non-members will not -- the non-members and

1 non-Indian's will not get an opportunity to participate in
2 the process whereby -- the political process, which
3 ultimately results in the appointment of the CRSTTA Board
4 of Commissioners and the fixing of rates by the Tribal
5 Council. So I think that the -- I think that the
6 inability to positively answer the question about whether
7 the consumers will be better off and will have safeguards
8 is basically -- is basically the question that the
9 Commission struggled with. And because they were unable
10 to answer that question affirmatively or satisfactorily,
11 they denied the sale.

12 Now, let me discuss Mescalero Apache v. Jones and
13 the cases that go along with that. Mescalero Apache v.
14 Jones and Potawatomi are very interesting cases and
15 it's difficult to reconcile each with the other. In
16 Mescalero Apache v. Jones, the Tribe was running a ski
17 resort off-reservation and the State, I believe, New
18 Mexico had attempted to collect a gross receipts tax. In
19 that case, the Tribe paid the tax under protest and sued
20 to get it back. And so the Government had the Tribe's
21 money. And in effect, the Supreme Court said, you can
22 keep the money.

23 Potawatomi is different. In Potawatomi, there
24 the Tribe was running a convenience store and had failed
25 to collect the tax so the Tribe still had the money. And

1 in that case, the Supreme Court said, well, perhaps the
2 Tribe owes you the money, however, you cannot use the
3 functions of the court system, you cannot sue the Tribe to
4 get it back. You cannot make them pay the tax because
5 they're protected by sovereign immunity.

6 So the sovereign immunity question was not raised in
7 Mescalero Apache v. Jones and at least raised in the
8 direct fashion in which it was raised in Potawatomi.

9 Now --

10 THE COURT: What about suing the officials of the
11 Tribe?

12 MR. LONG: I don't know what would happen there, your
13 Honor. There's some case law in South Dakota which would
14 suggest that we would have difficulty even getting service
15 on them that would be effective unless we caught them off
16 the reservation. Temple v. Smith and a couple of cases
17 like that suggest that we can't even get personal
18 jurisdiction over them under state law if we serve them on
19 the reservation. And I don't know how that could come
20 out.

21 But I think that the PUC's decision can be justified
22 in that Potawatomi talked about basically self-help
23 remedies and collection of taxes. The PUC is in the
24 regulation business. They do a lot more than simply
25 collect taxes. In fact, they don't collect taxes at all.

1 It's the Department of Revenue that collects taxes.

2 And I would like to point out also with reference to
3 the payment of the tax issue, you and Mr. McElroy
4 discussed the payment of the gross receipts taxes on that
5 portion of these disputed exchanges which might lie
6 outside the reservation boundaries. In fact, CRSTTA owns
7 a portion of an exchange outside the Cheyenne River
8 Reservation boundaries now and has owned it for some time.
9 That's part of the Isabelle exchange. And, of course, the
10 PUC finds in Finding Number 13 that the CRSTTA does not
11 pay gross receipts taxes on telephone exchanges it
12 currently operates.

13 It would seem logical to me that if the position
14 taken by the Telephone Authority were that yes, we owe
15 this tax, a simple mechanism to demonstrate that they owed
16 tax would be to simply pay it. And, of course, they've
17 not done that and the record reflects that they've not
18 done it, or at least to pay that portion of the tax which
19 would be attributable to the income they received from the
20 operation of the Isabelle exchange off-reservation.

21 Now, I would point out one other thing, your Honor.
22 The -- with reference to Wold Engineering, I have -- I
23 have struggled with Wold Engineering in terms of what it
24 means. And it seems to me that in Wold Engineering the
25 Court was very concerned about the fact that a right as

1 fundamental as access to the courts was being conditioned
2 upon a general waiver of sovereign immunity for all causes
3 of action by the Tribe. There's -- so I would point out a
4 couple things.

5 First of all, in Wold Engineering the Court
6 recognized that there are certain types of waivers of
7 sovereign immunity which would be inherent in the access
8 to the courts, that is to say, the Tribe would have to
9 respond to discovery, they would have to defend against
10 counterclaims, the Court could exercise sovereign immunity
11 -- or there would be no waiver of sovereign immunity or --
12 let me rephrase that.

13 The Court -- the Tribe would implicitly waive
14 sovereign immunity to the extent of a counterclaim and set
15 off and respond to orders of the Court and it was the
16 general waiver by the Tribe of all causes of action
17 generally across the board which appeared to be offensive
18 to the Court in Wold Engineering.

19 The -- and so -- and in addition, your Honor, Wold
20 Engineering was the type of case which involved, as the
21 Court has pointed out, a fundamental characteristic of
22 sovereignty which is operation of the court system and the
23 waiver of this sovereign immunity for all purposes. This
24 is a commercial transaction, your Honor. I mean, the
25 running of a telephone company can be governmental, but it

1 is not inherently governmental. US West is not a
2 governmental entity.

3 And I would point out one thing to the Court. The
4 relationship between Mescalero and Potawatomi and how
5 those two cases interact is actually in a case that's
6 before the U.S. Supreme Court right now and was argued
7 back in January. And I did not cite this in the brief,
8 but because of the nature of the way the questions have
9 come up, the -- this was a tribe in Oklahoma the Kiowa
10 tribe who purchased some stock from a non-Indian entity
11 off-reservation. They signed a promissory note and when
12 they defaulted on the note, the holder of the note sued
13 the Tribe in State Court in Oklahoma. And the -- and the
14 State Courts of Oklahoma held that sovereign immunity so
15 far as the Tribe was concerned insofar as commercial
16 transactions are concerned, ends at the state line -- or
17 excuse me, ends at the reservation boundary. And because
18 the note was executed off-reservation and had to do with
19 an off-reservation transaction, that the Tribe was not in
20 a position to be able to assert sovereign immunity.

21 Now, the Tribe understandably was unhappily with that
22 decision and petitioned the U.S. Supreme Court for cert
23 and the Supreme Court granted cert. And that case has
24 been briefed and it was argued in January on the 12th, I
25 believe, and so that decision may give some clarity to at

1 least some of the arguments that are being transferred
2 between Mr. McElroy and myself as to the nature and extent
3 of state authority to regulate the Cheyenne River Sioux
4 Tribal Telephone Authority assuming they were to get into
5 the commercial enterprise on the Standing Rock Reservation
6 or in Rapid City or in Sioux Falls or anyplace else.

7 Now, one doesn't know, obviously, which way the
8 Supreme Court is going to go on that case. But I did
9 bring the brief of the United States along relative to
10 that issue. And the position that they take to address
11 some of what -- some of the Court's questions, the
12 position they take --

13 THE COURT: They?

14 MR. LONG: I think this goes to --

15 THE COURT: Who's they?

16 MR. LONG: The United States as amicus on behalf of
17 the brief.

18 The position they take in reference to the argument
19 which they -- the United States takes the position that
20 tribes have extra-territorial sovereign immunity. In
21 other words, they are immune for all of their conduct
22 where so ever and how so ever they engage in. And as
23 against the public policy argument that that is really
24 unfair in off-reservation commercial transactions.

25 One of the things that they point out is that the --

1 is that entity that deals with the Tribe can protect
2 themselves by cash up front, if you will, by negotiating
3 special terms, by requesting a waiver of sovereign
4 immunity, or by simply refusing to deal with the Tribe.
5 And I think that in the commercial transaction that
6 reality goes more towards the Wold Engineering argument
7 than the one that's propounded by Mr. Maxfield and that is
8 the consumers in this case, your Honor, have no ability to
9 protect themselves. This is regulation of a commercial
10 transaction. And the PUC stands in the shoes of the
11 consumer to protect them. And if their view is consumers
12 cannot protect themselves and they, because of their
13 ability to regulate and control in certain circumstances
14 and their recognition of or question of the ability of the
15 Tribe -- or their own ability to protect the consumers,
16 they can just say no. They can just refuse to grant
17 approval because that's their function.

18 THE COURT: Anything else?

19 MR. LONG: Mr. Hoseck pointed out a minor point.
20 Apparently I made the statement that the PUC does not levy
21 taxes. Apparently there is a tax that the PUC levies.
22 I'm not familiar with it, but I stand corrected to that
23 extent. I don't think they levied the tax that we're
24 talking about in this instance.

25 THE COURT: Okay. Briefly, Mr. Aberle or Mr. Fergel,

1 is there anything?

2 MR. ABERLE: I will keep mine very brief. I'm not
3 going to go to all six.

4 I guess when I read SDCL 49-31-59 I come up with six
5 factors. I think I add in public interest. But when I
6 look at those factors, I look at it a little differently.
7 I set up kind of categories where one counts in favor of
8 either a plus, we should approve or negative counts
9 against or it doesn't, you know, fall on either side of
10 the fence.

11 And according to what the Tribe has indicated here
12 again today, they intend to provide the same level of
13 service as US West. There's no indication that there's
14 going to be enhanced service. There's no indication that
15 US West's current service is in any way deficient in any
16 one of these three exchanges. So therefore, as far as
17 quality of service, I don't put those in any category.

18 And I think what this really goes to is was the PUC
19 correct in analyzing these factors. What we see is that
20 there's going to be no benefits -- measurable benefits for
21 consumers if the sale is approved, but if it is approved,
22 there will be some detriments. And I believe that's what
23 the State has gone through primarily and I'm not going to
24 go into all of those.

25 The main one I want to go into is what struck me as

1 being wrong on the payment of taxes issues. And I know
2 Larry Long did indicate that there's a portion of the
3 Isabelle exchange which has been operated by Cheyenne
4 River Sioux Tribe for over 20 years now that does go off
5 the Cheyenne Indian Reservation and there's not been any
6 gross receipts tax paid on those sales which have been off
7 the reservation for the past 20 years. And according to
8 the arguments -- or at least change in argument that has
9 been brought forth by the Cheyenne River Telephone
10 Authority is that under Mescalero Apache v. Jones, the
11 State can require it. And we acknowledge that at least in
12 your decision that had been previously rendered.

13 Well, they don't acknowledge that and that is what
14 the PUC recognized and that's why they had -- they have
15 the concern that they mentioned in Finding of Fact Number
16 13 that the Cheyenne River Sioux Telephone Authority does
17 not pay gross receipts taxes, and was specifically told to
18 the Commission that you cannot force us to collect these
19 taxes.

20 And I don't believe that there is anything
21 discriminatory in the Commission deciding not to approve
22 these sales because I don't think any telephone purchaser,
23 if they would have come in and said we have not paid taxes
24 for 20 years, you cannot force us to pay these taxes, even
25 though we acknowledge they are lawfully imposed taxes, I

1 don't think we would be here with the Commission approving
2 any one of those sales either. I don't think there's
3 anything discriminatory in that nature.

4 And I guess I agree with everything else that Mr.
5 Long has been -- has pointed out so I'll leave my comments
6 at that.

7 MR. FERGEL: I have nothing further to add, your
8 Honor.

9 THE COURT: Any response from the Appellants?

10 MR. McELROY: If I can be real brief, your Honor. I
11 think that what I understand the Commission to be saying
12 is that it is able, under the guise of public interest, to
13 step into the shoes of the consumer and to deny these
14 sales on the basis of public interest that -- because of
15 characteristics that the Tribe brings to the table.

16 Well, the problem with that is the only thing that
17 the Commission has pointed to is -- to in terms of
18 protection -- certainly in terms of protection of the
19 consumer, the only thing that they have pointed to is some
20 fear that their regulatory authority may be diminished in
21 the future either because our reading of state authority
22 off the reservation under Mescalero Apache Tribe is
23 wrong or because of the injection of sovereign immunity.

24 Well, if that's true -- and I think Mr. Long referred
25 to some of the issues as being clouded. Assuming for the